

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID E. CARTER,)	No. C 03-5765 JSW (PR)
)	
Plaintiff,)	ORDER GRANTING
)	DEFENDANT'S MOTION FOR
vs.)	SUMMARY JUDGMENT
)	
KEVIN McCONNELL,)	(Docket no. 17)
)	
Defendant.)	

INTRODUCTION

Plaintiff David E. Carter filed this *pro se* civil rights action when he was incarcerated at the San Francisco County Jail. Thereafter, he was transferred to San Quentin State Prison as a sentenced prisoner. In a letter dated August 5, 2005, Plaintiff notified the Court that he was to be released from prison the next day and would be residing in Sacramento. Plaintiff has not communicated with the Court since.

In an Order dated April 26, 2004, the Court ordered service of Plaintiff's excessive force claim on Defendant San Francisco Sheriff Deputy McConnell. On August 19, 2005, Defendant McConnell filed a motion for summary judgment on the ground that Plaintiff has failed to exhaust his administrative remedies. Plaintiff has not filed an opposition. For the reasons discussed below, the Court GRANTS the motion for summary judgment.

STATEMENT OF FACTS

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2 In his complaint Plaintiff alleges that on December 5, 2002, excessive force was
3 used against him at the San Francisco County Jail by Deputy Sheriff Kevin McConnell
4 and at least four other deputies whose names are unknown. Specifically, he states that
5 after he requested a lunch and was refused one by McConnell, he was taken from the
6 holding tank to an isolation tank where McConnell and the other deputies slammed him
7 to the ground and tortured him. Plaintiff contends that McConnell had his elbow in a
8 lock and pushed it "toward the back of my head until it snapped." Plaintiff asserts he
9 was then hog tied and left naked for more than three days, after which he was denied
10 medical treatment for his injuries.

11 The complaint originally named as Defendants the San Francisco Sheriff's
12 Department and Deputy Sheriff McConnell. In its April 26, 2004, Order of Service, the
13 Court dismissed the San Francisco Sheriff's Department as a Defendant because Plaintiff
14 made no allegations of municipal liability. The Court also directed Plaintiff to name the
15 medical staff involved if he wished to pursue a claim related to the alleged failure to treat
16 his injuries, and to name additional deputies as Defendants if he wished to pursue claims
17 against them. Plaintiff never filed an amended complaint naming additional Defendants.
18 Accordingly, the complaint states a single claim, for excessive force, against a single
19 Defendant, Deputy Sheriff McConnell, arising out of the alleged use of excessive force.

DISCUSSION

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21 Defendant McConnell moves for summary judgment on the ground that Plaintiff
22 has failed to exhaust his administrative grievances before filing suit. The Prison
23 Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide that "[n]o action
24 shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other
25 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
26 such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
27 Although once within the discretion of the district court, exhaustion in prisoner cases
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1 covered by § 1997e(a) is now mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).
2 All available remedies must now be exhausted; those remedies "need not meet federal
3 standards, nor must they be 'plain, speedy, and effective.'" *Id.* (citation omitted). Even
4 when the prisoner seeks relief not available in grievance proceedings, notably money
5 damages, exhaustion is a prerequisite to suit. *Id.*; *Booth v. Churner*, 532 U.S. 731, 741
6 (2001). Similarly, exhaustion is a prerequisite to all inmate suits about prison life,
7 whether they involve general circumstances or particular episodes, and whether they
8 allege excessive force or some other wrong. *Porter*, 534 U.S. at 532.

9 Nonexhaustion under § 1997e(a) is an affirmative defense. *Wyatt v. Terhune*, 315
10 F.3d 1108, 1119 (9th Cir.), *cert. denied*, 540 U.S. 810 (2003). It should be treated as a
11 matter of abatement and brought in an "unenumerated Rule 12(b) motion rather than [in]
12 a motion for summary judgment." *Id.* (citations omitted). In deciding a motion to
13 dismiss for failure to exhaust administrative remedies under § 1997e(a), the court may
14 look beyond the pleadings and decide disputed issues of fact. *Id.* at 1119-20. If the court
15 concludes that the prisoner has not exhausted California's prison administrative process,
16 the proper remedy is dismissal without prejudice. *Id.* at 1120.

17 Here, Defendant has raised nonexhaustion in a motion for summary judgment,
18 rather than in an unenumerated motion to dismiss. This is not fatal to Defendant's
19 motion, however, because an unenumerated motion to dismiss for failure to exhaust is
20 closely analogous to summary judgment. *Id.* at 1120 n.14. Because Plaintiff was
21 provided with fair notice of his opportunity to develop a record, as is required for pro se
22 prisoners opposing motions for summary judgment or unenumerated motions to dismiss,
23 *see id.*, no prejudice accrues to Plaintiff by having the Court construe Defendant's motion
24 for summary judgment as an unenumerated motion to dismiss. Therefore, the motion for
25 summary judgment is so construed.

26 In support of his motion, Defendant has provided a declaration of San Francisco
27 County Jail Chief Deputy Tom Arata, and a copy of San Francisco Sheriff's Department
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1 regulations which show that in order to exhaust administrative remedies within the San
2 Francisco County Jail an inmate must: (1) submit a grievance complaining of the alleged
3 incident, and (2) upon denial of that grievance, file an appeal to the Custody Division
4 Commander. Deputy Arata states in his declaration that his review of all known San
5 Francisco County Jail records has revealed that although Plaintiff filed numerous
6 grievances in 2003, none of them allege or refer to any incident involving excessive
7 force. The records also reveal that Plaintiff never filed an appeal, on any subject, to the
8 Custody Division Commander.


9 The Court's review of the record of Plaintiff's administrative grievances supports
10 Defendant's assertions and reveals that Plaintiff has failed to exhaust his administrative
11 remedies with respect to his excessive force claim. As such, he has failed to satisfy his
12 obligation under § 1997e(a) to exhaust his administrative remedies before filing suit. *See*
13 *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (action must be dismissed
14 unless prisoner exhausted available administrative remedies before he filed suit, even if
15 prisoner fully exhausts while the suit is pending). The action must be dismissed without
16 prejudice. *See id.* at 1200-01.

17 CONCLUSION

18 For the foregoing reasons, Defendant's motion for summary judgment has been
19 construed as an unenumerated motion to dismiss for failure to exhaust administrative
20 remedies, and the motion is GRANTED. (Docket no. 17.) This action is DISMISSED
21 without prejudice. The Clerk of the Court shall enter judgment and close the file.

22 IT IS SO ORDERED.

23 DATED: February 6, 2006

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26 JEFFREY S. WHITE
27 United States District Judge
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